

This matter comes before us on the State's petition for rehearing, following our decision in Coleman v. State, No. 20A05-1008-CR-553 (Feb. 7, 2011). The State asks that we reconsider our determination that the trial court correctly vacated Coleman's conviction for Attempted Rape, a class B felony, on double jeopardy grounds. More specifically, the State alleges that we erred in concluding that it had waived its right to challenge the merger of Coleman's convictions for attempted rape and burglary. Moreover, the State claims that it did, in fact, object to the trial court's decision to merge the convictions at Coleman's sentencing hearing.

We grant the State's petition for rehearing and remand with instructions.

FACTS

The relevant facts, as reported in our original opinion, are that

[A]s K.B. unlocked and opened her apartment door, Coleman wedged his bicycle tire in the doorway and forced his way into the apartment. He then locked the door from the inside and blocked the door with his bicycle.

K.B. asked Coleman why he was in her apartment and told him to leave. He responded that "everything was going to be okay. That he was going to take his time with [her]," which she interpreted to mean that he intended to rape her. Tr. p. 181. Although K.B. told Coleman to stop, he shoved her down onto her bed, where her son lay sleeping. Coleman removed his shorts, climbed on top of K.B., and attempted to kiss her and remove her shirt.

K.B.'s friend, Shane Perrin, became alarmed when she did not respond to his attempts to contact her via cell phone. Perrin drove to K.B.'s apartment and knocked on the door. He entered the apartment, noted that K.B. looked

terrified, and ordered Coleman to leave. Although Coleman argued with Perrin, he eventually left.

After five or ten minutes, Coleman returned and knocked on K.B.'s door for an extended period of time. K.B., thinking that Coleman would leave if she spoke to him, exited her apartment and stood outside her front door to talk with Coleman as Perrin watched through the peep hole. Perrin noticed that Coleman had backed K.B. into a corner of the hallway, where she was cowering, at which point Perrin opened the door and threatened to call the police. Coleman left.

Slip op. at 2-3.

Following a jury trial, Coleman was convicted of attempted rape, a class B felony, burglary, a class B felony, and criminal confinement, a class D felony. Coleman was also found to be a habitual offender.

At the sentencing hearing, Coleman argued that the facts of the case demonstrated that the offenses were all “one course of conduct” and there was no distinction in the evidence that the State used to support the charges. Tr. p. 554. Thus, Coleman argued that the burglary and attempted rape convictions “merged,” and that he could be sentenced only for burglary and with being a habitual offender. *Id.* at 554, 571.

The State counter-argued at the sentencing hearing that the burglary and attempted rape convictions did not merge in accordance with Payne v. State, 777 N.E.2d 63 (Ind. Ct. App. 2002), and Farmer v. State, 908 N.E.2d 1192 (Ind. Ct. App. 2009). After hearing argument, the trial court merged the offenses and vacated Coleman's conviction for attempted rape. Slip op. at 5. Thereafter, Coleman was sentenced to an aggregate

term of fifty-three years of incarceration, which included a thirty-year enhancement on the habitual offender count.¹

Coleman argued on direct appeal to this court that the evidence was insufficient to support his conviction for burglary and criminal confinement. Coleman also challenged the appropriateness of the sentence. The State cross-appealed, arguing that the trial court erred in vacating Coleman's attempted rape conviction. More specifically, the State claimed that a conviction for both burglary and attempted rape did not violate double jeopardy principles.

In our original opinion, we affirmed Coleman's conviction for burglary and vacated his conviction for attempted rape. We determined, among other things, that the State "waived its cross-appeal by failing to object." Slip op. at 2. Thus, we upheld the trial court's decision to vacate Coleman's attempted rape conviction.

On rehearing, the State maintains that we erroneously held that it was required to object at sentencing to preserve the claim that the trial court should not merge the offenses. Moreover, the State argues that the deputy prosecutor did object as to whether the trial court should have vacated the attempted rape conviction.

In general, even if a party does not raise a double jeopardy argument on appeal, we may sua sponte address that issue. Leitch v. State, 736 N.E.2d 1284, 1288 (Ind. Ct. App. 2000) (citing Logan v. State, 729 N.E.2d 125, 126 (Ind. 2000)). Even so, the State correctly points out that just before Coleman was sentenced, the deputy prosecutor

¹ Coleman was also sentenced to three years on the confinement conviction.

objected and offered argument as to why the trial court should enter a judgment of conviction on all counts.

Thus, on rehearing, we will address the State's double jeopardy claim regarding Coleman's dual convictions for burglary and attempted rape. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Ind. Const. article I, § 14. Our Supreme Court has developed a two-part test for Indiana double jeopardy claims, holding that two or more offenses are the "same offense" in violation of Article 1, Section 14, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).

Under the actual evidence inquiry, the evidence presented at trial is reviewed to determine "whether each challenged offense was established by separate and distinct facts." Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008) (quoting Richardson v. State, 717 N.E.2d at 53). To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. Id.

Under the actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also

establish only one or even several, but not all, of the essential elements of a second offense. Id. (relying on Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002)). “Application of this test requires the court to ‘identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury’s perspective [:]’” Id. (quoting Spivey, 761 N.E.2d at 832).

The elements of the burglary as charged were that Coleman (1) broke and entered K.B.’s home (2) with the intent to commit the felony of rape therein. Appellant’s App. p. 88; I.C. § 35-43-2-1(B)(i). The elements of the attempted rape as charged were that Coleman (1) acting with the culpability to commit the crime of rape (2) knowingly attempted to have sexual intercourse with K.B. which was (3) a substantial step toward the commission of the crime of rape. Appellant’s App. p. 89-90; I.C. §§ 35-42-4-1(a)(1); 35-41-5-1. Thus, burglary requires a breaking and entering, an element not present in the attempted rape offense. These two offenses are, therefore, not the same under the same elements test.

With regard to the actual evidence inquiry, the record reflects that when Coleman entered K.B.’s apartment, he told her that “everything was going to be okay,” and that he “was going to take his time with [K.B.],” which was evidence of Coleman’s intent to rape her. Tr. p. 181. Coleman threw K.B. on the bed after removing his pants, straddled her, and attempted to remove her shirt and kiss her. Id. at 182-83. In our view, it is apparent that the evidence establishing Coleman’s intent to rape and his actual attempt to do so were separate and distinct. Thus, there is no reasonable possibility that the jury relied

upon the same evidence to convict him of both crimes. See Farmer v. State, 908 N.E.2d 1192, 1202 (Ind. Ct. App. 2009) (upholding defendant's convictions for burglary and theft where defendant declared upon entering, "I want money," and then proceeded to take his victim's property).

Because Coleman's convictions did not violate double jeopardy principles, the trial court should re-instate the attempted rape conviction and sentence Coleman on that offense. As a result, we grant rehearing and remand this cause with instructions that the trial court re-instate Coleman's conviction for attempted rape and for sentencing on that offense. In all other respects, we reaffirm our original opinion.

VAIDIK, J., and BARNES, J., concur.